(5)

No. 92-1662

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH STUART GRANDERSON, JR.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT RALPH STUART GRANDERSON, JR.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants sentenced in federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The parties have consented to the filing of this amicus curiae brief. A consent to file has been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

In *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1992), the Eleventh Circuit Court of Appeals, by applying the rule of lenity to an ambiguous statute, held that the term "original sentence" in 18 U.S.C. §3565(a) should be construed to mean the imprisonment range available under the federal sentencing guidelines at the time probation was imposed. This same result is available without resort to the rule of lenity. In the context of the federal sentencing statutes and guidelines, the plain meaning of "original sentence" is the guidelines calculation in the Sentencing Table prior to the non-final, conditional imposition of probation. This Court should follow the courts reaching this result without recourse to the rule of lenity.

The sentencing statutes and guidelines in effect since 1984 create a chronological, or sequential, sentencing process. The individual's offense and criminal history are calculated on a

matrix. Optional probation is available at the low end of the matrix for relatively minor offenses. The probation statutes unequivocally state that the option of a probationary "kind" of sentence is non-final and conditional. Once revoked, the probation option is annulled, leaving the computation of the guideline range on the sentencing table as the "original sentence."

The government's interpretation of 18 U.S.C. §3565 is untenable. Under the government's position, probation revocation sentences for misdemeanor offenses punishable by imprisonment for no more than a year, calculated at one-third of the "original sentence," would be for 20 months. This mathematical impossibility demonstrates the government's misconstruction of the statute. The supervised release statute also militates against the government's interpretation because it is analogous in structure to the probation statute, but uses very different language. The government's reliance on Federal Rule of Criminal Procedure 35(c) is misplaced because the focus of

guidelines appellate jurisdiction is on the calculation of the guideline range.

The plain meaning is also supported by legislative intent. Rather than demanding wholesale incarceration, Congress expressed concern that treatment be viewed as a priority and that needless incarceration be avoided. Lengthy incarceration as the mandatory response to a single lapse by non-violent probationers is contrary to rational treatment experience. Further, the needless incarceration of non-violent offenders exacerbates the mushrooming problem of over-crowded, expensive prison space.

ARGUMENT

IN THE CONTEXT OF OTHER FEDERAL SENTENCING STATUTES, THE PLAIN MEANING IN 18 U.S.C. §3565(a) OF "ORIGINAL SENTENCE" IS THE SENTENCING TABLE RANGE DETERMINED PRIOR TO THE IMPOSITION OF CONDITIONAL, NON-FINAL PROBATION.

The 1988 amendment language must be read in the context of other federal sentencing statutes in effect since the Comprehensive Crime Control Act of 1984. These statutes and subsequent guidelines create a new sentencing process from

which the terms of the amendment draw their meaning. Although the amendment to the probation revocation statute is not a model of clarity, the plain meaning of "original sentence," in the context of other federal statutes and guideline provisions, is the sentence calculation before the court chooses between probation and imprisonment options. This reading is strongly supported by Congress's expressed concern regarding drug treatment and preservation of the public from the costs of unnecessary incarceration.

A. The Plain Meaning Of The Statute Must Be Determined In The Context Of Related Sentencing Statutes And Guidelines.

The meaning of statutory language depends on its context in the language and design of the statute as a whole. *Deal v. United States*, 113 S.Ct. 1993, 1996 (1993); *King v. St. Vincent's Hospital*, 112 S.Ct. 570, 573 (1991); *McCarthy v. Bronson*, 111 S.Ct. 1737, 1740 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990). The plain meaning of the 1988 amendment to 18 U.S.C. §3565 must be determined in the context of the entire federal sentencing statutory scheme. The

Court should consider the structure of federal sentencing statutes and guidelines to arrive at the result reached by the *Granderson* court without resort to the rule of lenity. *United States v. Roberson*, 805 F.Supp. 879, 880-82 (D. Kan. 1992), *affirmed*, 991 F.2d 627 (10th Cir. 1993); *United States v. Gordon*, 961 F.2d 426, 430-35 (3d Cir. 1992); *see United States v. Clay*, 982 F.2d 959, 962-64 (6th Cir. 1993).

B. In the Context of Federal Sentencing Statutes, "Original Sentence" Means The Sentencing Calculation Under Subchapter A Of The Sentencing Statutes.

The restructuring of sentencing law in 1984 introduced a chronological, or sequential, approach to sentence computation. Under both statute and guideline, the sentencing process involves a calculation of a range of imprisonment from the Sentencing Table. U.S.S.G. §5A1.1.[1] Only after making that calculation does the court decide the "kind" of sentence to be imposed.

[1] The Sentencing Table is a matrix with the horizontal axis reflecting the defendant's criminal history, while the vertical axis reflects the severity of the offense. The intersection of these axes determines the imprisonment range.

Probation is a "kind" of sentence that is only available in Zones A and B of the Sentencing Table. Once revoked, the sentencing process returns to the Sentencing Table calculation for the "original sentence."

The basic statute on imposition of sentence states:

> *The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. §3553(b)(emphasis added). Subsection (a)(4) states:

> *The court, in determining the particular sentence imposed, shall consider --*
>
> ***
>
> (4) *the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines* that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced.

18 U.S.C. §3553(a)(4)(emphasis added). Thus, the statutes refer to "sentence" in the sense of a "kind" of sentence, a sentence

described by the guidelines calculations, a sentence above or below the guidelines calculation, and a particular sentence.

For certain categories of offenses and offenders, the guidelines and statutes permit imposition of probation as an alternative sanction to imprisonment. U.S.S.G. Ch. 5, intro. comment. The probation statutes themselves, in effect since 1984, are absolutely clear that the option to impose a probationary "kind" of sentence is conditional and not final. The probation statute specifically exempts a revoked sentence of probation from status as a final judgment:

> Effect of finality of judgment.-- Notwithstanding the fact that a sentence of probation can subsequently be modified or revoked pursuant to the provisions of section 3564 or 3565;
>
> ***
>
> a judgment of conviction that includes such a sentence constitutes a final judgment *for all other purposes*.

18 U.S.C. §3562(b)(emphasis added). The statute respecting probation length also explicitly recognizes the conditional nature of the probationary sentence: "[a] sentence of probation remains conditional and subject to revocation until its expiration or

termination." 18 U.S.C. §3564(e). As a conditional liberty subject to revocation and imposition of incarceration, the purposes and structure of probation under the present statutes are, as a practical matter, indistinguishable from the previous usage dating to the 17th century. *See Clay*, 982 F.2d at 962; *Gordon*, 961 F.2d at 432.

The 1988 amendment requires revocation of probation for drug possession. The plain meaning of "revocation" is that the order of a probationary term is annulled. WEBSTER'S THIRD INTERNATIONAL DICTIONARY at 1944 (1976). The nullification of the probation option returns the sentencing process to the point at which the judge chose probation as the "kind" of sentence imposed under 18 U.S.C. §3553(b). That point is generally Zones A and B of the Sentencing Table.

The Guideline on Imposition of a Term of Probation states:

> (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

U.S.S.G. §5B1.1. For all means of arriving at the probation option -- the point in the sentencing process before the conditional probation that was annulled by revocation -- the "original sentence" is the Sentencing Table calculation under subchapter A.

This statutory and guideline context is reflected in the language of §3565. The first part of §3565 enumerates the trial judge's options upon finding a violation of a condition of probation:

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

18 U.S.C. §3565(a). This statute articulates Congressional policy: punishment at revocation should focus on the offense of conviction, not the behavior that results in revocation.

This directive was recently restated in the Guidelines policy statements adopted by Congress in 1990. These policy statements reflect the debate on whether revocation consequences should concentrate on the offense of conviction or the revocation conduct. Congress approved a statement disclosing its belief that the primary purpose of probation revocation is not to punish new criminal conduct:

> After lengthy consideration, the Commission adopted the approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

U.S.S.G. §Ch.7, Pt.A, intro. comment (n. 3(b)). The courts have uniformly construed the Revocation Table, to the extent that it contradicts this policy, to be ineffective in the context of

probation revocation. *See, e.g.*, *United States v. Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States v. Boyd*, 961 F.2d 434, 437-38 (3d Cir. 1992); *United States v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991); *United States v. Von Washington*, 915 F.2d 390, 392 (8th Cir. 1990); *United States v. Smith*, 907 F.2d 133, 135-36 (11th Cir. 1990); *United States v. Alli*, 929 F.2d 995 (4th Cir. 1991).[2]

The amendment language itself is consistent both with probation as a conditional option nullified by revocation and the policy of primarily punishing the original crime, rather than the revocation conduct.

[2] The Ninth Circuit, in *United States v. Corpuz*, 953 F.2d 526, 530 (9th Cir. 1992), cited the Chapter 7 Revocation Table as support for the government's position. Ironically, *Corpuz's* reliance on the Revocation Table is based on the false assumption that simple possession of drugs is a Grade A violation. It is not. Grade A violations are defined in U.S.S.G. §7B1.1(a)(1)(ii) to include a felony "controlled substance offense." Under the Commentary to this section, "controlled substance offense" is defined in the Career Offender provisions -- U.S.S.G. §4B1.2. U.S.S.G. §7B1.1, comment. (n.2)(1990). That section includes only trafficking and manufacturing types of offenses, not simple possession of drugs. U.S.S.G. §4B1.2(2). Under federal law, simple possession of a drug is generally a misdemeanor (21 U.S.C. §844(a)) and therefore a Grade C violation. U.S.S.G. §7B1.1(a)(3)(1990). Under the Revocation Table, a sentence of less than one year is available for every Criminal History Category and required for Criminal History Categories I, II, and III. The Chapter 7 policy statements support, rather than undercut, the *Granderson* court's result.

> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

Thus, subsection (1) is irrelevant if possession of a controlled substance is involved, and subsection (2) is qualified by the limitation to one-third the imprisonment calculation before the conditional "kind" of sentence was determined to be probation. The amendment and subsection (2) must be read together because they are not irreconcilable and implied repeals are not favored. *Clay*, 982 F.2d at 963; *Gordon*, 961 F.2d at 431.

The "original sentence" cannot be the term of probation because, by the terms of the amendment itself, the probation option must be annulled.[3] This result is also compelled by the statutory and Guidelines policy that, upon revocation of

[3] This reading also avoids the absurd interpretation that one-third of the original sentence to probation requires a reduction in the probationary term (*e.g.*, three years probation must be reduced to at least one year probation). *See Gordon*, 961 F.2d at 433.

probation, the focus of punishment is primarily the original offense, not the behavior resulting in revocation.

The only logical, plain meaning of the statute, in the context of the federal sentencing scheme in effect since 1984, is that "original sentence" refers to the sentencing calculation under subchapter A prior to the option of conditional, non-final probation. Within the original subchapter A sentence that the defendant faced, the 1988 amendment limited the court to a sentence of one-third or more within that range.

C. The Government's Interpretation Of §3565 Cannot Be Reconciled With Other Federal Sentencing Statutes.

Reference to the general statutory scheme precludes the interpretation offered by the government. Most obviously, the term "original sentence" makes no reference to the conditional, non-final term of probation. If such an unusual result were intended, appropriate language was available. The absence of such a reference signals that "original sentence" refers to the sentencing stage before the probationary term was imposed. This reading is supported by the statutory maximum sentences

for federal misdemeanors, the supervised release statute, and Rule 35(c).

1. Misdemeanors.

The government's interpretation cannot be reconciled with the punishments available for misdemeanors. Misdemeanors are punishable by no more than one year incarceration. 18 U.S.C. §§ 3581(b)(6); 3559(a)(6). Under the probation statute, terms of probation of five years are authorized for all misdemeanors and felonies. 18 U.S.C. §3561(b). Therefore, under the government's interpretation of the statute, a mandatory sentence of 20 months is one-third of an "original sentence" that cannot exceed one year for a misdemeanor. The government's position is irrational and mathematically indefensible in the context of the applicable statutory maximum punishments.

This point is especially telling because misdemeanants are likely recipients of probationary sentences. By their nature, misdemeanors are relatively minor offenses usually involving no violence. The guideline ranges for such offenses are uniformly low.

2. Supervised Release -- 18 U.S.C. §3583(g).

Congress enacted a parallel amendment addressing revocation of supervised release for drug possession at the same time as the amendment to the probation revocation statute was adopted. Unlike the probation revocation amendment, the supervised release amendment specifies that the mandatory minimum sentence should be one-third of the term of supervision: "not less than one-third of the term of supervised release." 18 U.S.C. §3583(g). The marked semantic differences in these parallel statutes connote an intended penological difference between the term of supervision and the "original sentence." *Clay*, 982 F.2d at 963-64; *Gordon*, 961 F.2d at 431.

The probation and supervised release statutes are structurally similar. The supervised release statute sets out a range of imprisonment upon revocation that is often less than the period of supervision the same way the Sentencing Table computation limits probation revocation sentences. In 18 U.S.C. §3583(e)(3), punishment is limited upon revocation to the term of supervised release and the applicable guideline range for

supervised release "except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years if the offense was a Class C or D felony . . ."[4] Supervised release for Class B felonies can be up to 5 years; for Class C and D felonies, the maximum is 3 years supervised release. Probation also involves a term of supervision with a lesser guideline range calculated before the court exercises the conditional, non-final option of probation.

Despite these structural similarities, Congress chose to use very different language when describing the consequence of drug possession for persons under each form of conditional supervision. Supervised release involves a period of supervision with a lesser term of potential punishment; Congress specified the period of supervised release as the relevant period for

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[4] The statute qualifies the imposition of a prison term as "pursuant . . . to the provisions of the applicable policy statements issued by the Sentencing Commission . . ." 18 U.S.C. § 3583(e)(3). This reference is to the Chapter 7 policy statements that, since 1990, include a Revocation Table for guideline ranges upon revocation pursuant to the Congressional instruction in 28 U.S.C. §994(a)(3).

measuring the one-third mandatory minimum sentence. Congress pointedly does not specify the term of supervision in the probation statute as the measure for determining the one-third punishment upon revocation. In this context, the reference in the probation statute to "original sentence" is plainly to the guideline range calculated before the "kind" of sentence was determined to be probation, rather than imprisonment.

3. Fed.R.Crim.Pro. 35.

The government refers to Federal Rule of Criminal Procedure 35(c)(2) in support of its position.[5] Rule 35 refers to correction of a sentence determined under the sentencing guidelines appellate statute, 18 U.S.C. §3742, to have been "imposed in violation of law, to have been imposed as a result of an incorrect application of the guidelines or to be unreasonable." Fed.R.Crim.Pro. 35(a). Generally, appellate guideline jurisdiction is limited to incorrect calculations of the sentencing guideline range; a sentence within the guideline range

[5] The government's other citations to statutes using the term "original sentence" are irrelevant because the statutes pre-dated the Comprehensive Crime Control Act of 1984.

and not imposed in violation of law or as a result of an incorrect application of the guidelines is not appealable. *See, e.g., United States v. Davis*, 900 F.2d 1524, 1529 (10th Cir. 1990); *United States v. Guerrero*, 894 F.2d 261, 270 (7th Cir. 1990); *United States v. Soliman*, 889 F.2d 441 (2d Cir. 1989); *see generally* U.S.S.G. §5G1.1(c) (aside from statutory maximum and minimum sentences, "the sentence may be imposed at any point within the applicable guideline range"). Therefore, Rule 35's use of "original sentence" does not support the government's interpretation because appellate courts do not generally review whether a particular number of months incarceration was "incorrect"; the focus is whether the guidelines calculations were in violation of law or the result of an incorrect application of the guidelines.

D. The Congressional Intent Contradicts The Government's Construction Of The Statute Because The Legislative Emphasis Is On Treatment And Limiting The Costs Of Unnecessary Incarceration.

The government's Queen of Hearts caricature of Congressional intent ignores Congress' emphasis on treatment

and limiting incarceration costs. The legislative record and the social science of addiction treatment support the reading of "original sentence" as the subchapter A guideline range. The requirement of one-third of the guideline range is a stiff sanction consonant with the concerns expressed in the legislative history.

Congress leavened the concern for firm consequences for drug possession with a realistic emphasis on treatment and avoiding unnecessary incarceration. The legislators emphasized treatment and rehabilitation programs "which we must adequately fund if we are ever to truly rid our society of the drug scourge which afflicts us." 134 Cong. Rec. 32632 (1988)(remarks of Sen. Byrd); *see also id.* at 32638 (Sen. Pell)("We need treatment on demand."); *id.* at 32637 (Sen. Rockefeller) ("we must pay much more attention to . . . rehabilitating those who are addicted."); *id.* at 32639 (Sen. McConnell)("This legislation expands drug treatment and rehabilitation . . . . It is a war we must fight on all fronts."). In providing for administrative sanctions, Congress "recognize[d] that our courts and prisons are

seriously overcrowded and cannot bear the burden of processing these new criminal cases." *Id.* at 32634 (Sen. Dole).

1) Treatment Considerations.

Sixteen percent of the country's population are estimated to use illegal drugs in a single year. 134 Cong. Rec. 32636 (1988)(remarks of Sen. Rockefeller)("as many as 37 million Americans used illegal drugs in 1987"). Studies repeatedly confirm our anecdotal knowledge that many persons charged with crimes suffer from addiction. *See* BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991 (March 1993)(about 86% of inmates had used drugs and about 63% used drugs regularly); Wish & O'Neil, DRUG USE FORECASTING RESEARCH UPDATE: JANUARY TO MARCH 1989 (National Institute of Justice 1989). Congress has clearly recognized treatment as a priority for addressing this serious problem, especially for persons eligible for probationary sentences. 18 U.S.C. §3553(a)(2)(D)(court must consider defendant's need for medical care or "other correctional treatment in the most effective manner"); 18 U.S.C. §3563(b)(10) (discretionary

condition that probationer "undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose").

Involvement in substance abuse does not fit stereotypes. Each individual addiction is a unique combination of physical and psychological cravings, recreational pleasure seeking, genetic predisposition, self-treatment for underlying disorders, self-destructiveness, family patterning, and biochemical needs. However, two general considerations strongly favor Congressional intent for the lower mandatory minimum: the recognition that relapse is part of treatment and the futility of incarceration to treat addiction.

The literature of drug treatment is rife with recognition that, as with nicotine and alcohol addictions, relapse is part of recovery. *See, e.g.*, Arnold M. Washton, *Preventing Relapse to Cocaine*, 49:2 (Suppl) J. CLIN. PSYCHIATRY, February 1988), at

34;[6] Brownell, Marlatt, Lichtenstein & Wilson, *Understanding and Preventing Relapse*, AMER. PSYCHOLOGIST (July 1986), at 765. For reasons no one fully understands, addiction is not a switch that is turned on and off; those who suffer drug dependence must struggle daily and perhaps for a lifetime to overcome the urge to use. However, a lapse does not mean that treatment has failed or that more use of drugs necessarily follows. G. Alan Marlatt & Judith R. Gordon, RELAPSE PREVENTION (Guilford 1985) at 32-34.

When a probationer, who is by definition a non-dangerous offender,[7] uses drugs, a firm response is appropriate. However, a massive, condemnatory sentence to a lengthy term of

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[6] Dr. Washton emphasized that relapse is not indicative of treatment failure, as follows:

> Relapse is a signal that recovery is incomplete. It indicates that the patient's attitude and behavior require additional change. Any progress achieved up to the point of relapse is not automatically nullified by the use of drugs. Although relapse must never be recommended and should be taken seriously whenever it occurs, the clinician and patient must carefully examine any relapse episode for its learning value and not treat it as a failure.

Id. at 35.

[7] Probation is not available to persons convicted of Class A or Class B felonies and is excluded if the guideline range exceeds Zone B on the sentencing table. 18 U.S.C. §3561(a).

imprisonment contradicts the explicit policies adopted by Congress favoring treatment. In this context, the requirement of revocation and one-third of the guideline range is a severe consequence,[8] especially because it is typically followed by an additional period of supervised release.[9]

Incarceration alone does not treat addiction. Even if drugs were not available in prison, the period of imprisonment often results in release at the same level of need for controlled substances. However, treatment of drug addiction is a real possibility. *See, e.g.*, Institute of Medicine, TREATING DRUG PROBLEMS, Volume 1 (National Academy Press 1990) at 134-35; Carl G. Leukefeld & Frank M. Tims, *An Introduction to Compulsory Treatment for Drug Abuse*, NIDA MONOGRAPH 86

[8] We disagree with the government's claim that incarceration is required. Under the Guidelines, all probation sentences were originally in Zone A or Zone B which allows for incarceration or "a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment . . ." U.S.S.G. §5C1.1(c)(1) and (2).

[9] Whenever a sentence to a term of imprisonment is imposed, the court has the option of imposing supervised release for any offense greater than a petty offense. 18 U.S.C. §3583(a). If a person has violated probation, supervised release is likely to follow the incarceration. U.S.S.G. §5D1.2.

(1988) at 3. Terminated treatment and massive punishment for a single use deprecates the importance and difficulties of treatment of the probationer.

At one-third of the imprisonment under the Sentencing Table, probationers are subjected to a severe sanction for drug possession. For a Zone A probationer, possession of drugs results in mandatory revocation of probation, at least 60 days confinement, and a sentence to supervised release. Congress recognized this was a harsh sanction because it retained the mandatory minimum sentence of a $1,000.00 fine for first offenders guilty of simple possession of a controlled substance and 15 days incarceration and a $2,500.00 fine for repeat offenders. 21 U.S.C. §844.[10] Increasing the mandatory minimum by 400% for revoked probationers is certainly consistent with the intent to view possession of drugs seriously.

Increasing the mandatory minimum to 20 months, in excess of the statutory maximum for misdemeanors, increases the

[10] Congress also retained the expungement procedures for drug possessors convicted under §844. 18 U.S.C. §3607.

mandatory minimum for repeat drug offenders (15 days) by 4,000%. Moreover, the probationer may not even be a repeat drug offender. There is not a syllable in the legislative history, such as it is, that indicates any such Congressional intention. Indeed, such a vindictive and harsh view runs counter to the repeated expression of the need for treatment.

The severity of the sanction of one-third of the Sentencing Table calculation is also reflected in the comparative treatment of possession of drugs under the Guidelines. The Sentencing Table allots some of the lowest levels to drug possession offenses. U.S.S.G. §2D2.1(a). For example, a defendant with a long and sordid criminal history would face six to twelve months for possession of marijuana; one to seven months if the defendant accepted responsibility for the offense under U.S.S.G. §3E1.1. Under the government's view, by contrast, a first-time embezzler who received five years probation would have to receive a prison sentence of twenty months for possession of the same marijuana. In this context, the mandatory minimum provisions set an incrementally greater punishment as a floor to

the sentence; the government's interpretation simply proposes an irrationally disproportionate response inapposite to Congress' desire for treatment and prioritization of limited prison space.

2) Prison Space Considerations.

The Comprehensive Crime Control Act of 1984 specifically considered the effect of sentencing practices on the prisons. Congress instructed the Commission, in constructing the Guidelines, to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . ." 28 U.S.C. §994(g). These concerns support the limited reading of the probation revocation statute.

A prime consideration in the sentencing system created by the CCCA of 1984 is limitation of imprisonment to an amount "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. §3553(a). In addition to the evil of needless deprivation of liberty, this concern focuses on the costs of imprisonment.

In fiscal year 1992, the Sentencing Commission recorded 37,744 persons sentenced in federal courts. UNITED STATES SENTENCING COMMISSION, 1992 ANNUAL REPORT, Table 20. Of the annual dispositions in 1992, 8,976 defendants, or 23.8%, received probationary terms. *Id.* The overall number of probationers is presently about 53,991, of whom about 25% have drug abuse problems. PROBATION AND PRETRIAL SERVICES DIVISION OF THE ADMINISTRATIVE OFFICE, SUBSTANCE ABUSE TREATMENT PROGRAM SUMMARY REPORT (September 1993) at 3; *see* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,1992 ANNUAL REPORT, Table 21 (the number of drug dependent defendants under Probation Office supervision increased annually from 12,247 in fiscal year 1988; to 14,589 in 1989; 17,264 in 1990; 18,377 in 1991; and 19,152 in 1992.) In 1992, the courts terminated 2,909 probationers, about 22% of all terminations of probation, for violating conditions of probation. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1992 ANNUAL REPORT, Table E-7 at 311.

Given the number of drug dependent probationers and the normalcy of relapse, strict enforcement of the mandatory minimum statute at the rates advocated by the government creates an unsupportable burden on the prison system unintended by Congress. The costs of imprisonment are conservatively estimated by the Sentencing Commission to be $56.84 daily, or $20,803.00 per inmate per year. BOP OFFICE OF PUBLIC AFFAIRS, FACTS ON FEDERAL BUREAU OF PRISONS (June 1993).[11] The federal prison system, by the Bureau of Prisons' own estimates, is currently operating at 141% of its capacity. *Id.*

Nothing in the legislative history remotely suggests that Congress decided to require arbitrary and harsh punishment of drug users beyond one-third of the subchapter A calculation. The government's construction of §3565 runs contrary to rational treatment approaches to drug addiction and rational fiscal policies for the allocation of scarce prison resources.

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[11] This number is low because it does not consider amortization of prisons already in existence or construction costs of new prisons.

CONCLUSION

This Court should affirm the *Granderson* result because the plain meaning of the words "original sentence," in the context of the federal sentencing scheme, is to the subchapter A calculation prior to the imposition of the conditional, non-final probation option. The plain meaning is also the only reading consistent with Congressional policies favoring treatment of drug addiction and limiting needless incarceration of citizens.

Respectfully submitted,

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